

1005-7112-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

## FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Residential  
Building Contractor License of  
Superior Roofing, Inc., License  
No. 0006194

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing before  
Administrative Law  
Judge Peter C. Erickson at 10:00 a.m. on Wednesday, March 3, 1993  
at the  
Minnesota Department of Commerce, 133 East 7th Street, SI" Paul,  
Minnesota.  
The record closed on April 2, 1993, the date of receipt of the  
last post-  
hearing memorandum.

Carolyn Ham, Special Assistant Attorney General, 1100 Bremer  
Tower, 82  
East 7th Place, St. Paul, Minnesota 55101, appeared on behalf  
of the  
Complainant, Minnesota Department of Commerce. Joel C. (olden,  
Attorney at  
Law, 300 Southdale Place, 3400 West 66th Street, Minneapolis, Minnesota  
55435,  
appeared or behalf of the Respondent, Superior Roofing, Inc.

This Report is a recommendation, not a final  
decision. The  
Commissioner of Commerce will make the final decision after a review  
of the  
record which may adopt, reject or modify the Findings of Fact,  
Conclusions,  
and Recommendations contained herein. Pursuant to Minn. Stat.  
14.61, the  
final decision of the Commissioner of Commerce shall not be made  
until this  
Report has been made available to the parties to the proceeding for  
at least  
ten days. An opportunity must be afforded to each party adversely  
affected by  
this Report to file, exceptions and present argument to the  
Commissioner of  
Commerce. Parties should contact Bert McKasy, Commissioner,  
Minnesota  
Department of Commerce, 133 East 7th Street, St. Paul, Minnesota  
55101 to  
ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are:

(1) Whether Respondent possessed a valid residential building contractor license when this proceeding was commenced, thus allowing the Complainant to take action;

(2) Whether Respondent filed an application for a residential building contractor license which was incomplete and inaccurate in violation of Minn. Stat. VXEG O O

( 3) Whether Respondent violated Minn. Stat. 326.91, subd. 1(2) by having someone other than the president of the corporation sign for him; and

(4) Whether the Respondent has been shown to be incompetent, untrustworthy, or financially irresponsible in violation of Minn. Stat. 326.91, subd. 1(6).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS -OF-FACT

1. Superior Roofing, Inc. is a company which was in the business of commercial and residential roofing. James Bieniek is the president of the corporation whose offices are located 2717 East 32nd Street, Minneapolis, Minnesota 55406. During the relevant time period herein, Mark Hendricks worked for Respondent as a shingle salesman and flat-roof estimator. Rochelle Edwards worked in the office as a secretary, performing all of the clerical functions as directed by Mr. Bieniek and Mr. Hendricks in the president's absence.

2. James Bieniek sustained a back injury in February of 1989 and underwent surgery in April of 1991. During 1991 and 1992, Mr. Bieniek worked in the office only very intermittently, approximately thirty days during the two years. During this period of time, Mr. Bieniek authorized Rochelle Edwards to sign all checks and documents for him that required his signature. Ms. Edwards did this on a regular basis, without indicating in any way next to the signature that it was not really Mr. Bieniek who was signing.

3. Sometime prior to February 12, 1992, Mr. Bieniek became aware that a blank application form for a building contractor license was in the office. Mr. Bieniek did not desire licensure at that time, so, he did not instruct anyone else in the office to complete or send in the application.

4. On February 12, 1992, Mark Hendricks decided to file the application

for a building contractor license with the Minnesota Department of Commerce. Consequently, he instructed Rochelle Edwards as to the information to type on the application and how to answer all of the questions that were asked. Mr. Hendricks designated himself as the "qualifying person" whose responsibility it was to pass a required examination and complete required continuing education. The application specifically stated on it that if the applicant was a corporation, the qualifying person must be an officer, director, or employee designated by the corporation. The application further stated that, "if the 'qualifying person' leaves the applicant after a license is issued, applicant must notify the Department of Commerce and apply for a temporary license. . ." Ms. Edwards did not read the application she was filling out at Mr. Hendricks direction. Ms. Edwards signed the name of James Bieniek on the application as the signature of a corporate officer. The application was dated February 12, 1992 and notarized on the same date. Neither Mr. Hendricks nor Ms. Edwards informed Mr. Bieniek that an application had been submitted to the Department of Commerce for a building contractor license.

5. The following two questions were asked on the application form:

(1) "Has the applicant ever had an occupational license or permit censured, suspended, revoked, cancelled, terminated or been the subject of any type of administrative action?"; and

(2) "Has the applicant ever been a defendant in any lawsuit or been named in a civil judgment involving claims of fraud, misrepresentation, conversion, mismanagement of funds, breach of fiduciary duty or breach of contract?"

Ms. Edwards typed an "X" to signify a response of "No" to both of the questions asked as directed by Mr. Hendricks.

6. The application was received by the Department of Commerce on April 22, 1992.. It was the policy of the Department at that time to not do any investigation if the application did not contain affirmative answers to questions which would raise a question as to the applicant's fitness to be licensed. Consequently, on April 30, 1992, a residential contractor corporation license was issued to Superior Roofing, Inc. and Mark Hendricks as the "qualifying person". Both Mr. Hendricks and Superior Roofing, Inc. were named on the application which had an expiration date of March 31, 1993 and an I.D. Number of 0006194.

7. Sometime in September of 1992, the Department of Commerce became aware that Respondent's Class B building contractor's license issued by the City of Minneapolis had been suspended for a 15-day period from September 1, 1989 to September 15, 1989. This suspension was the result of a City of Minneapolis administrative action and settlement agreement entered into by James Bieniek. Mr. Bieniek signed the Suspension Order on August 21, 1989 as the president of Superior Roofing, Inc. Additionally, the Department became aware that the Respondent had five outstanding judgments against it which, according to court records, were unsatisfied.

8. On October 15, 1992, the Department of Commerce issued a Notice of and Order for Hearing and Order to Show Cause to Superior Roofing, Inc. The

Notice and Order alleged that the Respondent had violated Minn. Stat. 326.91 when it misrepresented in its application that no disciplinary action had ever been taken against it and that there were no outstanding judgments against it.

9. On October 19, 1992, Mark Hendricks sent a letter to the Department of Commerce informing it that he was leaving his employment with Superior Roofing, Inc. and that he would no longer function as the "qualifying person" for Respondent's building contractor license. No action was taken by either Superior Roofing, Inc. or the Department of Commerce after this letter was received from Mark Hendricks.

10. James Bieniek was not aware that Superior Roofing, Inc. had received a building contractor license from the State until after the Notice of and Order for Hearing had been received. Rochelle Edwards had worked for Mr. Bieniek and Superior Roofing, Inc. since May of 1988.

11. The two most recent unsatisfied judgments shown in court records dated August 15, 1990 and September 29, 1989 had actually been satisfied by the Respondent prior to the submission of its license application. There were, however, three additional unsatisfied judgments dated April 27, 1988 in

the amount of \$2,941 . 10; June 19, 1 989 in the amount of \$1 200; and September 1 5, 1989 in the amount of \$650. Mr. Bieniek was not aware of the three unsatisfied judgments as it was his practice to have all legal documents sent directly to his attorney.

12. On March 3, 1993, the Complainant issued an Amended Notice of and Order for Hearing which contained an additional allegation that the Respondent had violated Minn. Stat. 326.91 when it submitted an application containing James Bieniek's signature, which was actually signed by someone else. The record on this case was left open to allow the Respondent to offer additional evidence concerning the new allegation. However, Respondent chose not to reopen the hearing.

Based upon the forgoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Commissioner of Commerce have jurisdiction in this matter pursuant to Minn. Stat. 14.50, 326.91, and 45.027. The Notice of Hearing was, in all respects, proper and the Department has complied with all substantive and procedural requirements of law and rule.

2. Pursuant to Minn. Rules, pt. 1400.7300, subp. 5, the Complainant has the burden of proof to show by a preponderance of the evidence that the Respondent has committed the violations alleged herein.

3. The relevant provisions of Minn. Stat. 326.91 read as follows:  
Subdivision 1. Cause. The commissioner may order, deny, suspend, or revoke any license or may censure a licensee if the commissioner finds that the order is in the public interest, and that the applicant or licensee:

(1) has filed an application for a license which is incomplete in any material respect or contains any statement which, in light of the circumstances under which it is made, is false or misleading with respect to

any material fact;

(2) has engaged in a fraudulent, deceptive or dishonest practice;

(6) has been shown to be incompetent, untrustworthy or financially irresponsible.

Subdivision 2 of the above-section allows the Commissioner to impose a civil penalty pursuant to Minn. Stat. 45.027 in addition to any other disciplinary action taken.

4. The Complainant has proved that Respondent violated Minn. Stat. 326.91, subd. 1(1) when it filed an application which was incomplete and contained false statements with respect to the Respondent's previous license suspension and outstanding judgments.



5 . The Complainant has failed to prove that Respondent violated Minn. Stat. 326.91, subd. 1(2) by submitting an application which was signed by an employee other than the officer (president) whose name appeared thereon.

6. The Complainant has proved that the Respondent has violated Minn. Stat. 326.91, subd. 1(6) by permitting another employee to sign the application on behalf of the president and submitting an application which was not checked for veracity.

7. It is appropriate for the Commissioner to take action on this case because of the fact that the Respondent had a valid license, in part as a result of the alleged violations, and the fact that the remedy herein is broader than just action against the license.

8. Based upon the violations noted in Conclusions 4 and 6 above, disciplinary action against the Respondent is warranted.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED: That the Commissioner of Commerce take appropriate disciplinary action against the Respondent.

Dated this 20th day of April, 1993.

PETER C. ERICKSON  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, no transcript prepared

#### MEMORANDUM

Respondent initially argues that this proceeding is moot because when the Department received Mark Hendricks' letter removing himself from the residential contractor license as the "qualifying person", the license became void. The Department did not issue a temporary license to the Respondent at that time so there was nothing for the Department to take action against. The Judge disagrees. The violations herein occurred when the Respondent applied for licensure; a. time before it even held a license. After licensure was granted, the Department discovered information which it determined were

violations of the statute. A Notice of Hearing and Statement of Charges were issued by the Department before Mr. Hendricks' letter was received removing himself as the "qualifying person". Because of this sequence of events, public policy mandates that the Commissioner have authority to take action against the Licensee. See, State Farm Mutual Automobile Insurance Company 392 N.W.2d 558, 565 (Minn. App. 1986). Additionally, because the Commissioner has authority to assess a civil penalty in addition to the revocation or suspension of the license, this proceeding can hardly be viewed as being moot. A viable sanction for the violation of Minn. Stat. 326.91 is authorized by Minn. Stat. 45.027 despite the fact that the Respondent is no longer licensed.

The record in this case is clear that the Respondent filed an application with the Department which stated that no administrative sanctions had ever been imposed against it and that there were no outstanding unsatisfied judgments against it. The record is equally clear that Respondent's Minneapolis building contractor's license had been previously suspended for 15 days and there were three outstanding, unsatisfied judgments against Respondent at the time the application was filed. James Bieniek knew of the previous suspension, but he had no part in completing the application for licensure. Mr. Bieniek was not aware of the unsatisfied judgments at the time the application was filed. violations of Minn. Stat. 326.91, subd. 1(1) have been proved on the face of the application itself. No intent need be established. See, in Re Perron, 437 N.W.2d 92, 96 (Minn. App. 1989).

The record in this matter shows that Rochelle Edwards was given unlimited authority by James Bieniek to sign documents on this behalf. If all of the information contained in the application had been true, the Judge seriously doubts if the Department would consider Ms. Edwards' signing the application for Mr. Bieniek as a violation of the statute. Obviously, if Mr. Bieniek (or

the president of any other corporation for that matter) were unable to sign an application, giving authority for someone else to sign on his/her behalf does not seem to constitute a fraudulent, deceptive, or dishonest practice in violation of Minn. Stat. 326.91 , subd. 1(2). the real problem here rests with the notarization because the notary obviously didn't see Mr. Bieniek sign the application.

The Complainant has shown that the Respondent was both incompetent and untrustworthy in violation of Minn. Stat. 326.91 , subd. 1(6) for fil ling out an application which contained inaccuracies and misstatements and for signing Mr. Bieniek's name to the application without even checking with him regarding the contents. Although the Judge has concluded that It. Edwards did have authorization to sign the application, Mr. Bieniek acted incompetently by not requiring that he be notified and informed regarding documents such as the application for licensure herein. Respondent was untrustworthy for preparing and submitting an appication which it failed to verify and which contained the inaccuracies herein.

P.C.E.